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**Testimony of Marcel J. Bernier
Business Law Section
Co-Chair of the LLC Committee
Connecticut Bar Association**

**In SUPPORT of House Bill No. 5259
"An Act Concerning the Adoption of the Connecticut Uniform Limited Liability Company Act"**

**Judiciary Committee
February 29, 2016**

Senator Coleman, Representative Tong and members of the Judiciary Committee, Thank you for the opportunity to appear before the Judiciary Committee today.

My name is Marcel Bernier. I have been practicing law in Connecticut since 1982. I am a partner in the Hartford office of Murtha Cullina LLP. The focus of my practice is on corporate and limited liability company law. I am a Co-Chair of the CBA Business Law Section LLCs Committee (the "LLC Committee"). I am testifying on behalf of the Business Law Section of the Connecticut Bar Association to support Bill 5259.

The current Connecticut LLC Act (the "Current Act") is largely unchanged since 1993.

Seven times as many LLCs are being formed in Connecticut as corporations.

The goals of the CBA Business Law Section Executive Committee are for the new Connecticut LLC Act (the "New Act") to be: (i) patterned after the Revised Uniform LLC Act approved by the Uniform Law Commission (the "ULC") in 2013 (the "Uniform Act"); (ii) Connecticutized by continuing existing Connecticut laws when Connecticut laws are better for Connecticut than the provisions of the Uniform Act; and (iii) business friendly.

The New Act is more comprehensive, well written and modern than our Current Act. The New Act will be more business friendly, result in greater predictability for LLCs and will result in more LLCs being formed in Connecticut than would occur under the Current Act. The New Act will be beneficial for small LLCs which do not have a written operating agreement because the New Act provides a clearer set of default rules which will apply when the LLC does not have a written operating agreement.

The ULC comments to the Uniform Act and the decisions of other states interpreting the Uniform Act can be used to interpret the provisions of the Uniform Act and can be cited as authority regarding the meaning of the provisions of the New Act which are the same as or similar to the Uniform Act.

Sixteen states (Alabama, California, Florida, Hawaii, Idaho, Illinois, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Utah, Vermont, Washington and Wyoming) have enacted a version of the Uniform LLC Act and the Uniform LLC Act is currently pending enactment in Pennsylvania and South Carolina. Connecticut would be the 10th state to enact the most recent version of the Uniform Act.



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The ULC has reviewed and commented on the New Act and discussed the New Act with the CBA LLC Committee. The ULC has determined that the New Act is substantially similar to the Uniform Act and therefore may be called a Uniform Act.

The LLC Committee consists of the 12 business law attorneys listed below who have averaged practicing law for over 25 years: Marcel Bernier, Murtha Cullina, Hartford; Seth Klaskin, office of the Secretary of the State, Hartford; Joseph Selinger, Tobin, Carberry, O'Malley, Riley & Selinger, New London; Mark Sklarz, Day Pitney, New Haven; David Levine, Cohen & Wolf, Bridgeport; Sam Braunstein, Braunstein & Todisco, Fairfield; Elizabeth Seeley, Seelay & Berglass, Southport; Matthew Gaul, Carmody Torrance Sandak & Hennessey, New Haven; Rob Perelli-Minetti, Singer, Anner, & Perelli-Minetti, Greenwich; Paul Edelberg, Fox Rothschild, Stamford; Hillel Goldman, Mix & Goldman, Danbury; and Edward Spinella, Reid and Riege, Hartford. The LLC Committee has spent over 3 years and 2,000 attorney hours working on the New Act, including 40 conference calls lasting 90 minutes each.

The LLC Committee unanimously believes the New Act is better than the Current Act.

The CBA Business Law Section has unanimously approved the New Act.

The CBA Litigation Section has unanimously approved the New Act.

The CBA Legislative Program Review Committee has unanimously approved the New Act.

The CBA Board of Governors has unanimously approved the New Act.

The Secretary of the State's Office participated in drafting and supports the New Act.

The draft of the Report of the Commission on Connecticut's Leadership in Corporation and Business Law Established under Public Act 14-189 recommends, "Updating and revising the Connecticut limited liability company statutes patterned after the Revised Uniform Limited Liability Company Act". The New Act is patterned after the Revised Uniform Limited Liability Company Act.

The CBIA supports the New Act.

Improvements in the New Act

Article 1

1 defines distribution, disinterested individual, disinterested member, majority in interest of the members, material interest and material relationship.

The New Act may be varied by an operating agreement, except for the fourteen (14) items listed in Section 5(c).

5(d) states that if it is not manifestly unreasonable, the operating agreement may alter or eliminate aspects of the duty of loyalty and may alter the duty of care. It also states that a court determines as a matter of law what is manifestly unreasonable.



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Article 2

The certificate of organization no longer needs to state a purpose or if it is member managed or manager managed because this is in the operating agreement.

25(b) states that the certificate of organization must state the name and address of a member or a manager and an email address of the LLC.

Article 3

31 allows a certificate of organization to state a delayed effective date of no more than ninety days after filing.

37(a) states that a "member is not an agent of an LLC solely by reason of being a member".

37(a) is an improvement over 34-130 which states that each member is an agent of the LLC unless the member has no such authority and the other party knows it.

38(b) states that failure to observe formalities is not a ground for imposing liability on a member or a manager of the LLC.

Article 4

43(a) prohibits distributions to the members when an LLC is not able to pay debts as they become due or the LLC's assets are less than the LLC's liabilities.

The definition of distribution in 2(8) excludes "amounts constituting reasonable compensation".

45(a) states that an LLC is member-managed unless the operating agreement states the LLC is manager managed.

45(b)(3) states that a 2/3 in interest vote is required for an act outside ordinary course of business or to approve a Connecticut Entity Transactions Act transaction.

45(b)(4) states that the approval of all of the members is required to amend the operating agreement.

46(b) states that an LLC may indemnify a member, manager or officer of an LLC.

46(c) states that an LLC shall indemnify a member, manager or officer who is wholly successful in the defense of any proceeding.

47 is a clearer statement of fiduciary duties than 34-141.

47(b) states that the duty of loyalty includes the duty to:

- (i) account to the LLC for any property, profit or benefit derived by the member in the conduct of the activities of the LLC;



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- (ii) refrain from dealing with the LLC on behalf of someone with an interest adverse to the LLC; and
- (iii) refrain from competing with the LLC in the conduct of the activities of the LLC before dissolution of the LLC.

47(c) states that a member shall discharge the duties of such member:

- (i) in good faith;
- (ii) with the care of an ordinarily prudent person; and
- (iii) in a manner the member reasonably believes to be in the best interests of LLC.

47(c) is the same as the standards for the director of a corporation under 33-756.

47(d) states that a member shall discharge their duties consistently with the implied contract covenant of good faith and fair dealing.

47(f) states that a majority in interest of the disinterested members can authorize or ratify, after full disclosure of the material facts, any act or transaction that would otherwise breach duty of loyalty.

48 contains a more detailed statement of rights of a member to information about the LLC and how to obtain the information than 34-144.

Article 5

51 is a clearer regarding charging orders than 34-171.

51(c) states that a member may extinguish the charging order by satisfying the judgment and filing a copy of the satisfaction with the court.

51(d) states that the LLC or one or more members whose interests are not subject to the charging order can pay the judgment creditor in full and succeed to the rights of the judgment creditor, including the charging order.

51(e) states that the charging order is the exclusive remedy for satisfying the judgment from the judgment debtor's LLC interest.

Article 6

54(5) permits a member to be expelled by judicial order if the person:

- (i) has engaged or is engaging in wrongful conduct that has or will adversely and materially affect the LLC;
- (ii) has committed or is committing willfully or persistently a material breach of the operating agreement or a fiduciary duty; or
- (iii) has engaged or is engaging in conduct which makes it not reasonably practical to carry on the business of the LLC.



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Article 7

56(a)(4) permits judicial dissolution if the conduct of the activities of the LLC is unlawful or it is not reasonably practicable to carry on the activities of the LLC.

56(a)(5) permits judicial dissolution if the managers or members in control of the company act in a manner that is illegal or fraudulent or act in a manner that is oppressive and is or will be directly harmful to the member who applies for the dissolution

56(b) permits the court to order a remedy other than dissolution in a proceeding under Section 56(a)(5)

61 permits a dissolved LLC to apply to a court for a determination of the amount and form of security to provide for the payment of claims that are contingent or unknown. Within ten days after filing the application the LLC must give notice of the proceeding to each known claimant holding a contingent claim. If the LLC provides the amount and form of security ordered by the court, the LLC can distribute other assets to its members and the creditors cannot enforce their claims against such members.

Article 8

64 states that a member may commence a direct action against a manager, a member or an LLC for an injury that is not solely the result of an injury suffered or threatened to be suffered by the LLC.

65 states that a member may bring a derivative action to enforce a right of the LLC after making demand on the managers, the members or the LLC that they bring the action and they do not do so within 90 days or if such a demand would be futile.

68 permits an LLC in a derivative proceeding to appoint a special litigation committee composed of one or more disinterested individuals to investigate the claim.

69(b) permits the court to order:

- (i) the LLC to pay the plaintiff's expenses if the court finds the proceeding has resulted in a substantial benefit to the LLC;
- (ii) the plaintiff to pay any defendant's expenses if the court finds the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or
- (iii) a party to pay an opposing party's expenses with respect to a motion filed for an improper purpose such as to delay or harass.

69(b) is the same as 33-726 for corporations.

Article 11

102(d) states that the New Act shall not be construed to impair the obligations of any action commenced before July 1, 2017, any contract existing on July 1, 2017 or any right accrued before July 1, 2017.